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KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

MICHAEL K. KELLOGG  
PETER W. HUBER  
MARK C. HANSEN  
K. CHRIS TODD  
MARK L. EVANS  
AUSTIN C. SCHLICK

1301 K STREET, N.W.  
SUITE 1000 WEST  
WASHINGTON, D.C. 20005-3317

(202) 326-7900  
FACSIMILE:  
(202) 326-7999

STEVEN F. BENZ  
NEIL M. GORSUCH  
GEOFFREY M. KLINEBERG  
REID M. FIGEL  
HENK BRANDS  
SEAN A. LEV  
COURTNEY SIMMONS ELWOOD

November 18, 1999

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms. Dorothy Attwood  
Federal Communications Commission  
445 12th Street, S.W.  
Room 8-B201  
Washington, DC 20554

Re: Metrocall, Inc. v. BellSouth Telecommunications, BellSouth Corporation, GTE Telephone Operations, Pacific Bell Telephone Company, US West Communications, Inc., File Nos. E-98-14, E-98-16, E-98-17, E-98-18; Petitions for Reconsideration of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185

Dear Ms. Attwood:

Thank you for taking the time to meet with us on Friday. I am writing on behalf of BellSouth, GTE, and SBC to emphasize a few of the points that we touched on in our discussion but did not have an opportunity to elaborate.

First, I want to stress that LECs have *not* disobeyed the Commission's rules, deliberately or otherwise. In the first *Local Interconnection Order*,<sup>1</sup> the Commission held:

[S]ection 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic. As of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge.

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<sup>1</sup> First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996).

Ms. Dorothy Attwood

November 18, 1999

Page 2

11 FCC Rcd at 16016, ¶ 1042. This rule was codified at 47 C.F.R. § 51.703(b). LECs took this rule to heart: none of our clients has imposed charges for traffic since the effective date of the *Local Interconnection Order*.

In the wake of the adoption of the *Local Interconnection Order*, some paging providers took this rule and ran with it: they ceased paying all charges for facilities ordered out of state tariffs. We believed then and continue to believe now that this was a plain misreading of the Commission's rules. After bringing the situation to the attention of the Common Carrier Bureau, LECs were encouraged to seek clarification. After comments were filed and after a delay of several months, Richard Metzger, then-Chief of the Common Carrier Bureau, indicated that he too read the Commission's reference to charges for traffic as encompassing charges for facilities used to deliver traffic. He did so *not* in the form of an order, but in the form of an interpretive letter.

We immediately sought review of that interpretive letter; we were informed that such review would not be forthcoming because the letter was non-binding. Many paging carriers, however, did treat it as binding, and (if they had not done so already) stopped paying their state tariff charges for facilities.

These paging carriers stopped paying even though they had not negotiated under section 252. They had no interconnection agreements. They simply ordered facilities out of state tariffs and refused to pay for them.

Assuming for the sake of argument that the Metzger letter was correct (though the Commission has never said that it was, and we believe it was not), the paging carriers' refusal to pay anything at all for interconnection facilities is nonetheless unjustified. For one thing, interconnection facilities do not merely deliver traffic originated on the interconnecting LEC's network: they are also used to deliver transit traffic originated elsewhere. Even under the most aggressive reading of the Metzger letter, paging carriers are obligated to pay for the portion of facilities used to deliver transit and inter-MTA traffic.<sup>2</sup>

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<sup>2</sup> The amount can be very substantial. In one case where this issue *was* decided by a state commission, it determined that 26% of the calls delivered to a paging carrier's terminal were transiting traffic or inter-MTA traffic. See Final Arbitrator's Report, *Petition of Cook Telecom, Inc. for Arbitration Pursuant to Section 252 of the Federal Telecommunications Act of 1996 to Establish an Interconnection Agreement with Pacific Bell*, Application 97-02-003 (Cal. P.U.C. Feb. 3, 1997).

Ms. Dorothy Attwood

November 18, 1999

Page 3

Moreover, in all likelihood, the Metzger letter was not intended to cover any facilities beyond the interconnection facility used to connect the paging terminal to the LEC's serving wire center. Other facilities — such as foreign exchange ("FX") type facilities<sup>3</sup> — should not fall within the letter's mandate. Yet some paging carriers are paying *nothing* for the facilities they have ordered from state tariffs.

When their complaints are adjudicated and damages calculated — again assuming that the Metzger letter is correct — in all likelihood it is the paging providers that will owe LECs money. Paging carriers, in other words, have taken a free ride, even though no Commission rule or any interpretive letter has suggested that they may do so.

Nevertheless, while this dispute has been pending, no LEC has cut off a paging carrier's service. Moreover, LECs have continued to provision new facilities, knowing that paging carriers would not pay for them. No matter how broadly one reads the Metzger letter, LECs have complied with it.

Second, LECs agree that the Commission should enforce its rules, but the interpretation of a former Bureau Chief is not a Commission rule. Section 51.703(b) refers to "charges . . . for local telecommunications traffic that originates on the LEC's network." 47 C.F.R. § 51.703(b). Our position has always been that this provision means what it says: that LECs may not impose charges for traffic. We do not.

A separate provision, section 51.709(b), dictates what rates a carrier may charge for "transmission facilities dedicated to the transmission of traffic between two carriers' networks." 47 C.F.R. 51.709(b). It is plain that this section, and not 51.703(b), covers charges for facilities, the Metzger letter notwithstanding.<sup>4</sup> And it is equally plain that section 51.709 applies "[i]n state proceedings" (47 C.F.R. § 51.709(a)), that is, the section 252 arbitration and approval process. Paging carriers may have an argument that they are entitled to some free facilities under section 251 and 252 and the Commission's rules. But they must press those arguments in negotiations

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<sup>3</sup> Foreign exchange service permits a subscriber to obtain local numbers in end offices outside of the subscriber's local calling area. Paging carriers often use similar arrangements, involving long-haul facilities, to offer service in multiple local exchange areas using a single paging terminal. This gives paging carriers the ability to offer wide-area, toll-free calling.

<sup>4</sup> LECs raised this precise point repeatedly both before the Metzger letter was issued and in Applications for Review of the Metzger letter filed in January, 1998. *See, e.g.*, Application for Review of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell (filed Jan. 29, 1998). Neither the Metzger letter nor the FCC has ever addressed it.

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

Ms. Dorothy Attwood

November 18, 1999

Page 4

with LECs, with the possibility of arbitration by state commissions and federal court review. That is the process that the Act and the Commission require. See *Local Interconnection Order*, 11 FCC Rcd at 16005, ¶ 1024 ("As a practical matter, sections 251 and 252 create a time-limited negotiation and arbitration process to ensure that interconnection agreements will be reached between incumbent LECs and telecommunications carriers, including CMRS providers.").

Third, if the Commission were to uphold the Metzger letter and provide that paging carriers may order facilities from state tariffs with no obligation to pay for them, the Commission would exceed its authority under the Act. The LEC-CMRS interconnection rules adopted in the *Local Interconnection Order* were adopted "under section 251 and 252." 11 FCC Rcd at 16005, ¶ 1023. Section 251(c)(1) requires all telecommunications carriers, those requesting interconnection and incumbent LECs, to negotiate in good faith the terms of interconnection agreements to implement the duties set forth in the Act. 47 U.S.C. § 251(c)(1). Paging providers have a choice: they can continue to order facilities out of state tariffs (and pay for those facilities according to the legally imposed charges) or they may negotiate interconnection agreements. Otherwise, the FCC will have effected a direct, wholesale preemption of state tariffs; something that sections 251 and 252 does not permit.

We have elaborated this jurisdictional argument at greater length in our earlier letter to Chris Wright, a copy of which we provided on Friday.

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None of the foregoing arguments calls into question any of the Commission's existing rules governing LEC-paging interconnection. To be sure, we believe those rules are wrong as a matter of policy and as a matter of statutory interpretation. We will continue to press for the Commission to reconsider those rules and to place LEC-paging interconnection on a rational footing. Until that time, LECs will obey the rules. LECs merely ask that those rules be applied according to their terms and consistently with the Act's procedural requirements.

I hope that the foregoing information is helpful. Please call me at (202) 326-7902 if I can provide any further clarification.

Sincerely,

  
Michael K. Kellogg

cc: Counsel of Record